Supreme Court, U.S.
FILED
APR 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT DiBERNARDO and THEODORE ROTHSTEIN,

Petitioners,

– against –

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

HERALD PRICE FAHRINGER
DIARMUID WHITE
Attorneys for Petitioner
Robert DiBernardo
540 Madison Avenue
New York, New York 10022
(212) 751-1330

RALPH J. SCHWARZ, JR.
KEITH N. COSTA
STEWART G. STONE
Attorneys for Petitioner
Theodore Rothstein
122 East 42nd Street
New York, New York 10168
(212) 867-8850

April 28, 1986

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PETITIONERS REPLY BRIEF	1

TABLE OF AUTHORITIES

Case	Page
United States v. Mechanik ____ U.S. ____, 89 L.Ed.2d 50, 106 S.Ct. ____ (1986)	2

No. 85-1354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT DiBERNARDO and THEODORE ROTHSTEIN,

Petitioners,

— against —

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

The respondent tries to frustrate this Court's consideration of a critical issue affecting grand jury due process throughout the United States by urging the Eleventh Circuit's decision is non-final. Although the circuit court remanded the case to the trial court for proceedings not inconsistent with their opinion, the crucial issue, decided by the Eleventh Circuit, holding that a district court's right to exercise its supervisory powers over prosecutorial misconduct is conditioned upon that misconduct being *intentional* is a conclusive judgment on this important federal question.

No matter what the outcome of the proceedings in the district court on remand, the rule announced by the Eleventh Circuit will remain unaffected and ineligible for relitigation in the federal courts. If this unfortunate judgment is left uncorrected, prosecutors can now do as they please before grand juries.

They may present, as the district court found as uncontradicted fact, "highly prejudicial evidence" which is without basis and has "no bearing" on the indictment issues. They may offer, as the district court also found as unchallenged fact, testimony totally unworthy of belief without fear of having an indictment dismissed because the defendants are unable to prove that their conduct was deliberate – all this no matter how egregious the prejudice. Surely such a rule is constitutionally intolerable in light of our long history of regarding a grand jury as an institution to protect citizens from such overzealous conduct.

It must be emphasized that in our case and unlike *United States v. Mechanik*, ____ U.S. ____, 106 S.Ct. ____ (or any case relied on by the Eleventh Circuit) the district court found *actual* prejudice to the petitioners in the grand jury presentation. In addition our case, unlike *Mechanik*, involves the prosecutor's intentional deception of the district court about the evidence actually presented to the grand jury.[1]

The question left open in *United States v. Mechanik* concerns what a district court is empowered to do when it has concluded that the misconduct before a grand jury has caused *actual prejudice* to the defendants. If a district court fails to take action in advance of trial and the case ends in a conviction, the prosecutor's conduct is forever unreviewable.

Is this Court prepared to say that official misconduct before grand juries, which results in *actual prejudice* to the defendants,

---

[1] In *Mechanik* this court noted that there was no "suggestion that the government designedly withheld" information from the district court.

shall never be reviewable and thus correctible? If that is so, then we might as well abolish grand juries and leave it to prosecutors to decide who shall be indicted and who shall not. Our constitution provides that no person shall be held to answer for an infamous crime unless upon indictment of a grand jury. The basic institution underlying this constitutional safeguard, with its lengthy history, is to preserve a fair method of initiating charges against persons suspected of criminal conduct.

If the rule announced by the Eleventh Circuit is to remain in force then the American grand jury system will be emasculated and the Fifth Amendment will, in effect, be repealed. For all these reasons the petition for certiorari should be granted.

Respectfully Submitted,

HERALD PRICE FAHRINGER
DIARMUID WHITE
Attorneys for Petitioner
Robert DiBernardo
540 Madison Avenue
New York, New York 10022
(212) 751-1330

RALPH J. SCHWARZ, JR.
KEITH N. COSTA
STEWART G. STONE
Attorneys for Petitioner
Theodore Rothstein
122 East 42nd Street
New York, New York 10168
(212) 867-8850

DATED: New York, New York
April 28, 1986